

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

THEODORE BUCHER,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

) Case No. DEMO-02-0002

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and BUSSE NUTLEY, Member. The hearing was held in the Superintendent's Conference Room at the Monroe Correctional Complex in Monroe, Washington, on July 24 and 25, 2003. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Theodore Bucher was present and was represented by Tracey A. Thompson, Staff Attorney for Teamsters Local Union No. 117. Valerie Petrie, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, gross misconduct and willful violation of agency policies. Respondent alleges that Appellant subjected a female coworker to inappropriate and unprofessional behavior that violated the agency's sexual harassment policy.

II. FINDINGS OF FACT

2.1 Appellant Theodore Bucher is a permanent employee for Respondent Department of Corrections. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on January 25, 2002.

2.2 By letter dated January 2, 2002, Robert Moore, Superintendent of the Monroe Correctional Complex, notified Appellant of his demotion from his position as a Correctional Sergeant to a position as a Correctional Officer 2, effective at the end of his shift on January 23, 2002. Mr. Moore charged Appellant with neglect of duty, gross misconduct and willful violation of agency policy. Mr. Moore specifically alleged that Appellant engaged in inappropriate and unprofessional behavior directed at a subordinate that violated the agency's sexual harassment policy.

2.3 Appellant began his employment with Department of Corrections on August 6, 1979. Appellant has no history of disciplinary or corrective actions. Appellant's performance evaluations reflect that he met or exceeded normal requirements. As a Sergeant, Appellant has supervisory responsibility over other correctional officers.

2.4 The specific allegations outlined in the disciplinary letter from Superintendent Moore concerned Appellant's behavior toward Correctional Officer (CO) 2 Katherine Godinho between October 2000 through July 2001. CO Godinho claimed that during that period of time, Appellant engaged in a pattern of behavior which she considered sexual harassment. Appellant and CO Godinho worked together at the Twin Rivers Corrections Center which houses inmates who have been convicted and sentenced for committing sex crimes.

1 2.5 During his testimony, Appellant admitted to engaging in a large portion of the conduct in
2 the disciplinary letter. He admitted that he engaged in behavior that included jokes of a sexual
3 nature, use of profanity and teasing CO Godinho. Appellant claimed, however, that CO Godinho
4 participated in the joking. He also claimed that immediately after CO Godinho told him to stop, he
5 complied with her request. A preponderance of the evidence supports that Appellant did not, in
6 fact, cease making offensive comments to CO Godinho until she finally reported his behavior to
7 management on July 11, 2001. Based on the testimony of other witnesses who observed
8 Appellant's conduct, the testimony of CO Godinho, who we find to be credible and consistent, and
9 the testimony of Appellant, who generally confirmed and in some cases admitted to the substance of
10 CO Godinho's allegations, we find the following:

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12 Allegation #1

13 2.6 In October 2000, CO Godinho told Appellant that her radio battery was low. CO Godinho
14 imitated the "beep, beep" sound made by the battery. Appellant responded, "Look out. She's
15 backing up." Both Appellant and CO Godinho laughed at Appellant's joke. Later that day, CO
16 Godinho was patting down an inmate. When she bent down, Appellant, who was in the control
17 booth observing CO Godinho, yelled out through gun port, "Look out. She's backing up."

18
19 2.7 CO Godinho felt that Appellant's comment was of a sexual nature because her backside was
20 to Appellant. She believed that Appellant's comment was directed at her buttocks. CO Godinho
21 was offended with Appellant's joke, especially because it occurred in the presence of inmates. CO
22 Godinho angrily told Appellant that a little joking went a long way with her, but that if he ever did
23 it again, she would pull him through the gun port. Appellant apologized. This was the first
24 negative interaction that CO Godinho had experienced with Appellant, and she believed she had let
25 him know that he was not to interact with her in an inappropriate manner again.

1 2.8 At the time, Appellant was the Main Control Sergeant and CO Godinho had contact with
2 him several times during the shift. Following the incident, Appellant repeatedly taunted CO
3 Godinho by saying “beep, beep. Look out. She’s backing up.” CO Godinho also had contact with
4 Appellant in the staff parking lot after their shift was over. Appellant used his keyless entry remote,
5 which beeped the car horn when the car was locked/unlocked. Each time Appellant said, “Look
6 out. She’s backing up.” On one occasion, Appellant followed CO Godinho, who was leaving the
7 institution, honking his horn at her. Appellant’s comments and actions were directed to CO
8 Godinho.

9
10 2.9 Appellant’s repeated teasing disturbed CO Godinho, and she asked him on numerous
11 occasions to stop making the “beep, beep” comment to her. Appellant did not comply with her
12 request.

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14 Allegation #2.

15 2.10 In January 2001, Appellant became CO Godinho’s direct supervisor. Sometime that month,
16 Appellant, while in the presence of other staff, reached and grabbed CO Godinho’s pony tail.
17 Appellant asked CO Godinho, “Do you know what they call pony tails in prison?” When CO
18 Godinho responded “no,” Appellant replied, “They are pull strings for super speed cock suckers.”
19 Appellant made a motion as if he were pulling the string on a lawn mower or a toy. In response to
20 CO Godinho’s question about why Appellant made comments like that to her, Appellant responded
21 that he liked to see the expression on her face.

22
23 2.11 Thereafter, Appellant referred to CO Godinho as “pull string” or “pull toy” while making a
24 pulling motion. CO Godinho became angry and offended each time Appellant repeated the
25 statement to her and she told Appellant on numerous occasions to stop. Appellant did not comply
26 with CO Godinho’s request. Other officers who witnessed Appellant make the “pony tail” joke and

1 heard Appellant refer to CO Godinho as a “pull string” believed that Appellant’s conduct went
2 beyond what was acceptable in the workplace.

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4 Allegation #3

5 2.12 In April 2001, CO Godinho was in the break room eating a slice of pie. Other officers were
6 present when Appellant walked in and asked CO Godinho what she was eating. CO Godinho
7 replied “pie.” Appellant looked at the pie box and said, “you know she’s a lesbian?” in reference to
8 the label on the pie box, which was the name of a woman. CO Godinho replied, “so” to which
9 Appellant responded, “well, you’re eating her pie.” Appellant laughed. CO Godinho interpreted
10 Appellant’s comment as an innuendo for oral sex.

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12 Allegation #4

13 2.13 In late May or early July 2001, after shift exchange, CO Godinho talked to Appellant about
14 his behavior. CO Godinho felt that Appellant was singling her out, and she told him that she was
15 serious and that she wanted him to “knock it off” because his comments had gone beyond what they
16 should have. Appellant appeared angry, said nothing and walked back into the institution. Later
17 that evening, CO Godinho was sitting on a bench. Appellant walked in front of CO Godinho,
18 turned his back to her and passed gas in front of her face. CO Godinho became angry and called
19 Appellant a “fucking pig.” Appellant responded, “Oh, you don’t like kisses blown to you either?”
20 CO Godinho felt that Appellant’s behavior and comment were directly related to their earlier
21 conversation that day when she asked him to “knock it off.”

22
23 2.14 Appellant’s comments to CO Godinho were unsolicited, offensive and unwelcome. His
24 behavior negatively impacted CO Godinho, and she became distressed and withdrawn at work. CO
25 Godinho told several other officers that Appellant’s behavior bothered her.

1 2.15 The Department of Corrections adheres to a policy which allows employees to work in an
2 environment free from unsolicited, unwelcome, and inappropriate sexual overtones. The
3 department has adopted and published policies which require employees to maintain high ethical
4 and professional standards at all times and which prohibit sexual harassment. DOC Policy 853.025
5 defines sexual harassment as behavior of a sexual nature which is unwelcome and personally
6 offensive to the recipient of the action. The policy further defines a hostile working environment as
7 a working situation in which the employee has not suffered any tangible economic loss as a result of
8 the alleged harassment but rather the employee has been subjected to a working environment that is
9 sexually offensive or intimidating to the employee. The policy states that sexual harassment
10 includes, but it not limited to, “sexually offensive language, comments, jokes, innuendoes ... pranks
11 of a sexual nature ... unwelcome physical contact ...” The DOC Employee Handbook requires that
12 fellow employees be treated with dignity and respect.

13
14 2.15 Superintendent Robert Moore was Appellant’s appointing authority when the discipline was
15 imposed. Following a meeting during which Appellant admitted to engaging in many of the
16 comments and behaviors claimed by CO Godinho, Mr. Moore concluded that Appellant engaged in
17 misconduct that required disciplinary action. Mr. Moore concluded that Appellant engaged in
18 behavior that was discriminatory, demeaning and unethical toward CO Godinho by subjecting her
19 to unwelcome comments and jokes of a sexual nature. Mr. Moore concluded that Appellant’s
20 misconduct violated the department’s code of ethics, violated the Department of Correction’s sexual
21 harassment policy, and that his behavior amounted to gross misconduct.

22
23 2.16 Mr. Moore considered Appellant’s claims that CO Godinho participated in some of the
24 joking. Mr. Moore recognized that while CO Godinho may have engaged in joking in an attempt to
25 fit into a male dominated environment, Appellant, nonetheless, continued to make inappropriate
26 comments to her even after she told him to stop. Appellant also claimed that his supervisor also

1 participated in the joking. Mr. Moore concluded that Appellant, who held a supervisory position,
2 should be held accountable for his actions. Mr. Moore did not believe that Appellant's behavior
3 should be condoned because another supervisor participated in and failed to stop the inappropriate
4 joking and bantering. Mr. Moore concluded that Appellant's misconduct negatively impacted CO
5 Godinho's ability to work and detracted from her ability to focus on the inmates.

6
7 2.17 In determining the level of discipline, Mr. Moore considered Appellant's length of service,
8 his employment record, and the seriousness of the misconduct. Mr. Moore considered termination,
9 but felt that Appellant's long history with the institution warranted a less severe sanction. Mr.
10 Moore concluded that a demotion, which removed Appellant from supervising others, was the
11 appropriate sanction.

12 13 **III. ARGUMENTS OF THE PARTIES**

14 3.1 Respondent argues that Appellant engaged in a pattern of misconduct that CO Godinho
15 considered sexual harassment. Respondent argues that although there was an environment of joking
16 among the employees at the institution, Appellant's conduct toward CO Godinho was offensive.
17 Respondent argues that CO Godinho told Appellant to stop, but he continued to subject her to
18 inappropriate and offensive comments, which affected her work environment. Respondent argues
19 that Appellant breeched his duties as an employee and as a supervisor and failed to treat CO
20 Godinho with dignity and respect, to act ethically with high moral standards and to serve as a role
21 model for others. Respondent argues that Appellant neglected his duty, willfully violated agency
22 policy and engaged in gross misconduct. Respondent contends that demotion to a non-supervisory
23 position was the appropriate sanction.

24
25 3.2 Appellant asserts that staff at the institution deals with the shocking sexual behavior of
26 inmates by making jokes. Appellant asserts that talking and joking about inmate behavior alleviates

1 the strain on staff. Appellant asserts that sexual jokes were normal in the workplace, that all staff
2 members engaged in sexual joking and that supervisory staff engaged in and tolerated the joking.
3 Appellant argues that the discipline was not appropriate because of the context in which his conduct
4 occurred. Appellant denies that he neglected his duty or that he engaged in sexual harassment, and
5 he argues that his sense of humor was morale building. Appellant also denies that his behavior
6 constituted gross misconduct or violated policy, and he asserts that CO Godinho also participated in
7 some of the jokes. Appellant argues that he did not believe that he was committing sexual
8 harassment, and he asserts that staff followed the lead of supervisors who engaged in similar joking.

10 IV. CONCLUSIONS OF LAW

11 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

12
13 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
14 the charges upon which the action was initiated by proving by a preponderance of the credible
15 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
16 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
17 Corrections, PAB No. D82-084 (1983).

18
19 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
20 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
21 of Social & Health Services, PAB No. D86-119 (1987).

22
23 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
24 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant
25 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
26 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

1
2 4.5 Willful violation of published employing agency or institution or Personnel Resources
3 Board rules or regulations is established by facts showing the existence and publication of the rules
4 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
5 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

6
7 4.6 Respondent has proven by a preponderance of the credible evidence that Appellant
8 subjected his subordinate, CO Godinho, to uninvited and unwelcome behavior of a sexual nature
9 that created an offensive working environment for her. Appellant subjected CO Godinho to
10 offensive language and subjected her to demoralizing comments, such as referring to her as a "pull
11 string," a term that clearly related back to his joke that pony tails were "pull strings for high speed
12 cock suckers." Furthermore, the constant teasing and taunting that Appellant subjected CO
13 Godinho to, whether sexual in nature or not, was hostile and harassing. Appellant deliberately
14 disregarded CO Godinho's requests that he stop taunting her and cease making inappropriate
15 comments to her. Appellant abused his authority as a supervisor, and his misconduct created an
16 intimidating, hostile and offensive work environment for CO Godinho.

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18 4.7 Appellant neglected his duty to act in a professional manner and treat others with dignity
19 and respect. Furthermore, Appellant's misconduct undermined the department's policy against
20 sexual harassment and interfered with the department's ability to ensure that its employees were
21 protected from any form of sexual harassment in the workplace. Appellant disregarded the
22 institution's standard of expected behavior, and his misconduct rises to the level of gross
23 misconduct.

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25 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to
26 the facts and circumstances, including the seriousness and circumstances of the offenses. The

1 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
2 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
3 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4
5 4.9 Appellant attempts to mitigate his behavior by claiming that his language and jokes were
6 appropriate in the context of a prison environment. Nevertheless, other correctional officers
7 testified that Appellant's "pony tail joke" exceeded the appropriate and professional boundaries of
8 acceptable behavior at the institution. Appellant clearly engaged in crude, inappropriate and
9 unprofessional joking and behavior in the workplace. Furthermore, the actions of Appellant's
10 supervisor in condoning and participating in unprofessional and unethical behavior does not lessen
11 or excuse Appellant's misconduct. Under the facts and circumstances of this case, including the
12 seriousness of the offenses and the repeated pattern of Appellant's misconduct, we conclude that
13 Respondent has proven that the sanction of demotion to a non-supervisory position is appropriate.
14 Therefore, the appeal of Theodore Bucher should be denied.

15
16 **V. ORDER**

17 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Theodore Bucher is denied.

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19 DATED this _____ day of _____, 2003.

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21 WASHINGTON STATE PERSONNEL APPEALS BOARD

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23 _____
24 Walter T. Hubbard, Chair

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26 _____
Busse Nutley, Member

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